

Zhan Ke Sheng & Ors v Insp Sayed Mohd Faizal bin Sayed Baharom & Ors A

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION B
NO WA-44-273-10 OF 2019
AHMAD SHAHRIR JC
29 NOVEMBER 2019

Criminal Procedure — Habeas corpus — Application for — Foreign nationals arrested under Prevention of Crime Act 1959 (‘POCA’) challenged magistrate’s decision to remand them for 21 days under POCA — Whether remand orders were properly issued under s 4(1)(a) of POCA — Whether magistrate had issued remand orders on police inspector’s written and signed statement giving grounds for believing persons arrested were concerned in organisation and promotion of unlawful gaming — Whether applicants for habeas corpus had not shown any procedural impropriety in the making of the remand orders C D

The applicants were Chinese nationals who were initially arrested along with three others for an immigration offence. They were remanded for two weeks pending investigations. At the end of the remand period, the ‘three others’ were charged with an immigration offence while the applicants were re-arrested under s 3(1) of the Prevention of Crime Act 1959 (‘the POCA’) and ordered by the magistrate to be remanded for 21 days under POCA pending investigations. In their instant application for habeas corpus, the applicants challenged the 21 day remand order, made under s 4(1)(a) of the POCA, contending that their detention was baseless and invalid, in contravention of procedures and mala fide. Inter alia, the applicants argued that they were not informed of the grounds of their arrest or of their right to counsel pursuant to s 28A of the Criminal Procedure Code. The respondents contended that the 21 day remand order was valid as the magistrate had complied with all the requirements of s 4(1)(a) of the POCA. E F G

Held, dismissing the application: H

- (1) The conditions under s 4(1)(a) of the POCA were fully complied with when the magistrate issued the remand orders against the applicants. The remand application to the magistrate was accompanied by the first respondent’s written and signed statement stating the grounds for believing that the names of the applicants should be entered on the Register within the meaning of s 12 of the POCA, namely, that they were concerned with the organisation and promotion of unlawful gaming which was a registrable category under para 5 of the First Schedule of the I

- A POCA. Accordingly, the applicants failed to show that there was any procedural impropriety in the making of the remand orders (see paras 15 & 22).
- B (2) The applicants failed to traverse by affidavit the first respondent's contention that the grounds of arrest of the applicants were interpreted and explained to them in Mandarin by Sergeant Wong Boon Wai and that the applicants had understood him. The court was therefore entitled to take the position that the specific averment in that respect remained unchallenged and was deemed admitted by the applicants. In any event,
- C this ground did not strike at the heart of the impugned remand orders. In an application for issuance of a writ of habeas corpus, the alleged procedural impropriety must relate distinctly to the detention order itself as distinguished from the detention per se (see para 16).
- D (3) The purport of s 28A of the Criminal Procedure Code, specifically s 28A(2), was to afford arrested persons the right to counsel before any form of questioning or recording of any statement from them commenced. In the present application, there was no averment in any of the applicants' affidavits that they were denied of the right under that particular circumstance within the meaning of s 28A(2) of the CPC. In
- E fact, there was no averment that the questioning of the applicants had commenced or that a statement had been recorded from any of them (see para 19).
- F (4) The applicants' arguments concerning their earlier arrest and remand under the Immigration Act or with regard to the prosecutorial powers of the public prosecutor were irrelevant to their application for habeas corpus. The application related distinctly to the remand order that was made under s 4(1)(a) of the POCA (see para 21).
- G **[Bahasa Malaysia summary]**
Pemohon-pemohon merupakan warganegara Cina yang telah asalnya ditahan bersama tiga yang lain di atas kesalahan imigresen. Mereka telah direman selama dua minggu untuk siasatan. Apabila tempoh reman telah tamat, 'tiga yang lain' telah didakwa di atas kesalahan imigresen manakala
- H pemohon-pemohon ditahan semula di bawah s 3(1) Akta Pencegahan Jenayah 1959 ('Akta') dan telah diarahkan magistret untuk direman selama 21 hari di bawah Akta untuk siasatan. Di dalam permohonan habeas corpus segera mereka, pemohon-pemohon telah mencabar arahan 21 hari reman tersebut yang dibuat di bawah s 4(1)(a) Akta mengusulkan bahawa penahanan mereka
- I adalah tidak berasas dan tidak sah, bertentangan dengan prosedur dan mala fide. Antaranya, pemohon-pemohon telah berhujah bahawa mereka tidak dimaklumkan berkenaan alasan-alasan penangkapan mereka atau hak untuk mendapatkan peguam di bawah s 28A Kanun Tatacara Jenayah. Responden-responden telah berhujah bahawa reman 21 hari tersebut adalah

sah atas alasan magistret telah mematuhi kesemua syarat-syarat di bawah s 4(1)(a) Akta.

A

Diputuskan, menolak permohonan:

- (1) Syarat-syarat di bawah s 4(1)(a) Akta telah dipatuhi apabila magistret telah mengisukan arahan reman terhadap pemohon-pemohon. Permohonan reman dibuat kepada magistret telah disertakan kenyataan bertulis dan ditandatangani oleh responden pertama menyatakan alasan-alasan mempercayai bahawa nama-nama pemohon sepatutnya dimasukkan di dalam Register di dalam maksud diberikan di bawah s 12 Akta disebabkan bimbang dengan organisasi dan promosi permainan yang menyalahi undang-undang yang boleh didaftarkan sebagai kategori di bawah perenggan 5 Jadual Pertama Akta. Pemohon-pemohon juga telah gagal untuk menunjukkan bahawa terdapat kesalahan dari segi prosedur dalam membuat arahan reman (lihat perenggan 15 & 22)
- (2) Pemohon-pemohon telah gagal untuk mematahkan secara affidavit hujahan responden pertama bahawa alasan tangkapan pemohon-pemohon telah ditaksir dan diterangkan kepada mereka dalam Bahasa Mandarin oleh Sarjan Wong Boon Wai dan pemohon-pemohon telah memahami beliau. Oleh itu, mahkamah mempunyai hak untuk mengambil keputusan bahawa penegasan khusus berkenaan perkara tersebut kekal tidak dicabar dan menganggap ianya diakui oleh pemohon-pemohon. Namun, alasan ini tidak memberi kesan yang mendalam kepada arahan reman yang telah dicabar. Di dalam permohonan untuk isu writ habeas corpus, kesalahan dari segi prosedur yang telah didakwa mestilah berkaitan dengan jelas terhadap arahan penahanan itu sendiri dan dibezakan dari penahanan per se (lihat perenggan 16)
- (3) Kegunaan s 28A Kanun Tatacara Jenayah, terutamanya s 28A(2), adalah untuk memberikan hak mendapatkan peguam kepada individu yang telah ditahan sebelum sebarang soal siasat atau rakaman pernyataan bermula. Untuk permohonan oleh pemohon-pemohon, tiada penegasan di dalam affidavit pemohon-pemohon yang menyatakan mereka telah dinafikan hak di bawah situasi tersebut di bawah maksud s 28A(2) Kanun Tatacara Jenayah. Hakikatnya, tiada penegasan bahawa soal siasat ke atas pemohon-pemohon telah dilakukan atau pernyataan telah direkodkan dari mereka (lihat perenggan 19).
- (4) Hujahan-hujahan pemohon-pemohon berkenaan tahanan asal mereka dan reman di bawah Akta Imigresen atau berkenaan dengan kuasa-kuasa dakwaan oleh pihak pendakwa raya adalah tidak relevan terhadap permohonan mereka untuk habeas corpus. Permohonan tersebut adalah berkaitan dengan jelas terhadap arahan reman yang telah dibuat di bawah s 4(1)(a) Akta (lihat perenggan 21)]

B

C

D

E

F

G

H

I

A Cases referred to

L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2018] Supp MLJ 393; [2010] 7 CLJ 653; [2010] 2 MLRA 182; [2011] 1 AMR 109, FC (refd)

B *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667; [2005] 3 CLJ 914; [2005] 1 MLRA 692; [2005] 4 AMR 724, FC (refd)

Mohammad Azanul Haqimi bin Tuan Ahmad Azahari v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 6 MLJ 220; [2019] 8 CLJ 465; [2019] 5 MLRA 1; [2019] 5 AMR 546, FC (refd)

C *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613; [2005] 2 MLRA 231; [2006] 2 AMR 193, FC (refd)

D *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403; [2006] 4 CLJ 687; [2006] 2 MLRA 230; [2006] 5 AMR 689, FC (refd)

SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 6 CLJ 705; [2009] 2 MLRA 631; [2010] 3 AMR 781, FC (refd)

E Legislation referred to

Criminal Procedure Code s 28A, 28A(2)

Immigration Act 1959/1963 s 6(1)(c)

F Prevention of Crime Act 1959 ss 2, 3(1), (1A), 4(1), (1)(a), (3), 12, 12(1), Part I, First Schedule, para 5

Jacky Loi (TY Teh, Vijey Esvaren a/l Purnshatman, Nur Aminahatul Mardiah bt Md Nor and PG Cyril a/l PG Chandradasa with him) (Vijey Esvaren) for the applicants.

G *Mohamad bin Sinti (Senior Federal Counsel, Ministry of Home Affairs) for the respondents.*

Ahmad Shahrir JC:

H INTRODUCTION

I [1] This is an application for the issuance of a writ of habeas corpus for the immediate release of the applicants who are Chinese nationals. The applicants were arrested on 18 October 2019 under s 3(1) of the Prevention of Crime Act 1959 ('the POCA'). On 19 October 2019, the magistrate issued an order pursuant to s 4(1)(a) of the POCA for the applicants to be remanded for 21 days. In the present application, the applicants challenge the remand order dated 19 October 2019 made by the magistrate.

BRIEF FACTUAL MATRIX

A

[2] The applicants together with three other persons were initially arrested on 4 October 2019 pursuant to investigations into an offence under the Immigration Act 1959/1963 and remanded until 17 October 2019. The lawyer who was engaged to represent the applicants is Mr Vijey Esvaren. The lawyer then wrote to the investigating officer to give notice of legal representation and sought the assistance of the investigating officer to make certain verifications in respect of the passports of the applicants. Pursuant to inquiries, the lawyer found that the investigation papers for the case have been forwarded to the deputy public prosecutor for an allegedly 'no further action' ('NFA') directions and for arrangements to be made for the applicants to be detained under the POCA. On 17 October 2019, the remand of the applicants was extended to 18 October 2019 whereas the three other persons who were earlier arrested together with the applicants were charged for an offence under s 6(1)(c) of the Immigration Act 1959/1963.

B

C

D

[3] Meanwhile, on 18 October 2019 the first respondent and his team arrested the applicants at the compound of the Ampang Jaya Police District Headquarters, Ampang, Selangor. The arrests were made pursuant to s 3(1) of the POCA. The first respondent then lodged police reports to document all the arrests and eventually, the applicants were remanded for 21 days under s 4(1)(a) of the POCA. Chronologically, the events leading to the present application are as follows:

E

- (a) on 18 October 2019 the applicants were arrested under s 3(1) of the POCA;
- (b) on 19 October 2019 an order for the applicants to be remanded for 21 days pursuant to s 4(1)(a) of the POCA was made by the magistrate. The remand order expires on 8 November 2019;
- (c) on 21 October 2019, the case was referred to the deputy public prosecutor pursuant to s 3(1A) of the Act for directions and the deputy public prosecutor decided that there were reasonable grounds for an inquiry to be held in respect of the applicants; and
- (d) on 29 October 2019, the present application was filed.

F

G

H

THE APPLICATION

[4] On 29 October 2019, the applicants filed an application for the issuance of a writ of habeas corpus. In the application, the applicants pray for the following reliefs:

I

- (a) for an order that the applicants be brought before this court for the hearing of the application;

- A** (b) for a declaration that the arrest and detention of the applicants under s 4(1)(a) of the POCA or any other provisions of the POCA are invalid, without basis, in contravention of the procedures and mala fide;
- (c) for a writ of habeas corpus be issued to immediately release the applicants; and
- B** (d) for an order that the applicants not to be arrested or detained again upon their release.

- C** The respective affidavits filed for and against the application are as follows:
- (a) 'Afidavit Sokongan' affirmed on 29 October 2019 by Vijey Esvaren a/l Purnshatman (encl 3) on behalf of the applicants;
 - (b) 'Afidavit Sokongan II' affirmed on 29 October 2019 by Nur A'minahtul Mardiah bt Md Nor (encl 4) on behalf of the applicants; and
 - D** (c) 'Afidavit Jawapan' affirmed on 4 November 2019 by Insp Polis Sayed Mohd Faizal bin Sayed Baharom (encl 7) as the first respondent.

BRIEF DELIBERATION

- E** *Contention of the applicants*

[5] The contention of the learned counsel for the applicants in support of the application may be briefly stated as follows:

- F** (a) that the applicants were not informed of their grounds of arrest;
- (b) that in breach of s 4(3) of the POCA, the applicants were denied of their right to counsel under s 28A of the Criminal Procedure Code and that the respondents did not inform the whereabouts of the applicants to the lawyers;
- G** (c) that there was no basis for the applicants to be detained under POCA as they should have been charged together with the three other persons under s 6(1)(c) of the Immigration Act 1959/1963;
- H** (d) that the remand order made by the magistrate has prevented the public prosecutor from exercising his discretionary powers to institute criminal proceedings against the applicants; and
- (e) that the applicants were already in remand under the Immigration Act 1959/1963 and the remand expired on 17 October 2019. The extended remand of the applicants on 18 October 2019 in excess of 14 days is unlawful and it follows that the subsequent remand of the applicants under POCA is also unlawful and was made mala fide.
- I**

Contention of the respondents

A

[6] In opposing the application, the arguments of the learned deputy public prosecutor may be summarised as follows:

- (a) that the magistrate has complied with all the requirements of s 4(1)(a) of the POCA when he issued the remand order dated 19 October 2019; and
- (b) the fact that there is no reply by the applicants against the averment in the affidavit affirmed by the first respondent that the statement under s 4(1)(a) of the POCA has been duly produced before the magistrate amounts to an admission by the applicants of the fact so averred.

B

C

EVALUATION

[7] It is trite that in an application for the issuance of a writ of habeas corpus, the challenge must be directed against the current detention order although the earlier or initial arrest may be irregular (see *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613; [2005] 2 MLRA 231; [2006] 2 AMR 193 (FC) and *L Rajanderan all R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] Supp MLJ 393; [2010] 7 CLJ 653; [2010] 2 MLRA 182; [2011] 1 AMR 109 (FC)).

D

E

[8] It is also well-established that where an order of detention is challenged by means of an application for the issuance of a writ of habeas corpus, it is the duty of the court to ascertain whether the grounds relied on by the applicant in his application relate to one of procedural non-compliance. In determining this issue, the court must consider the procedural requirements relating to the detention order as prescribed by the relevant laws or rules (see: *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667; [2005] 3 CLJ 914; [2005] 1 MLRA 692; [2005] 4 AMR 724 (FC)). Procedural requirements are in turn categorised as either mandatory or directory. In *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403; [2006] 4 CLJ 687; [2006] 2 MLRA 230; [2006] 5 AMR 689 (FC), the apex court clarifies the distinction between the two and its respective effect on the detention order arising out of non compliance as follows:

F

G

H

- (a) a procedural requirement may either be mandatory or directory;
- (b) a mandatory procedural requirement is one that goes to the root of the matter and affects the detention order;
- (c) a breach of the mandatory procedural requirement renders the detention order invalid without the necessity to establish any prejudice; and

I

- A (d) a breach of the directory procedural requirement is not significant provided there is substantial compliance with the rules and the detainee did not suffer any prejudice.

- B [9] In an application for the issuance of a writ of habeas corpus, the burden to satisfy this Court that the detention is lawful lies throughout on the detaining authority (see: *SK Tangakaliswaran all Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705; [2009] 2 MLRA 631; [2010] 3 AMR 781 (FC)). The same principle is reiterated by the Federal Court in *Mohammad Azanul Haqimi bin Tuan Ahmad Azahari v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 220; [2019] 8 CLJ 465; [2019] 5 MLRA 1; [2019] 5 AMR 546 (FC).

Propriety of the remand order

- D [10] In the present application, the impugned detention of the applicants relates to the respective remand orders made by the magistrate pursuant to s 4(1)(a) of the POCA. Section 4(1)(a) of the POCA provides for the conditions to be fulfilled before the magistrate may make an order of remand for a period of 21 days. It is only upon satisfaction of these conditions that the magistrate may validly issue the order for remand. The conditions are, in that sense, mandatory in nature.

Section 4(1)(a) of the POCA reads as follows:

- F 4 Procedure before Magistrate
- F (1) Whenever any person is taken before a Magistrate under subsection 3(2) the Magistrate shall —
- G (a) on production of a statement in writing signed by a police officer not below the rank of Inspector stating that there are grounds for believing that the name of that person should be entered on the Register, remand the person in police custody for a period of twenty-one days; or
- G (b) if no such statement is produced, and there are no other grounds on which the person is lawfully detained, direct his release.

- H [11] To recapitulate, the magistrate is empowered under s 4(1)(a) of the POCA to order the applicants to be remanded for a period of 21 days if there is before him a statement signed by a police officer not below the rank of Inspector stating that there are grounds for believing that the names of the applicants should be entered on the Register. The Register specified to under s 4(1)(a) of the POCA refers to the register as defined under s 2 of the Act.

- I

Section 2 of the POCA reads as follows:

2 Interpretation

- (1) In this Act, unless the context otherwise requires —

‘Register’ means the register kept by the Registrar under section 12 and s 12 of the POCA reads as follows:

12 Registration of persons believed to be members of any of the registrable categories

- (1) The Registrar shall keep a Register for the purposes of this Act, in which shall be entered the name of every person who was the subject of the inquiry against whom the Board has reversed the finding under paragraph 10A(1)(b) or confirmed the finding under paragraph 10A(2)(a) together with such other particulars as may be prescribed by the Minister.
- (2) The Board may, if it considers in the interest of public order or security to do so, with or without inquiry under this Act direct the Registrar to enter in the Register the name, and such other particulars as may be prescribed, of any person who is a member of any of the registrable categories prescribed in Part II of the First Schedule.

[12] The orders of the magistrate to remand the respective applicants for the period of 21 days are annexed collectively as exh SMF2 in the affidavit affirmed by the first respondent. In the respective order, the statement of Insp Sayed Mohd Faizal bin Sayed Baharom, namely the first respondent, is stated and followed by the statement pronouncing the order for the respective applicants to be remanded for 21 days pursuant to s 4(1) of the POCA.

[13] The statements as contemplated under s 4(1)(a) of the POCA and referred to by the Magistrate in making the remand orders are exhibited collectively as exh SMF3 in the affidavit affirmed by the first respondent. The specific averment in this respect is contained in para 9 of the same affidavit. Each statement is dated 19 October 2019 and made by Insp Sayed Mohd Faizal bin Sayed Baharom, the first respondent. In the statement, the first respondent states that upon examining the evidence, he is satisfied that there are grounds to believe that the names of the detainees, respectively, should be entered on the register kept by the registrar under s 12(1) of the POCA and categorised under para 5, Part I of the First Schedule of the POCA, namely.

[14] In the statement annexed as exh SMF3, the first respondent also states he believes:

- (a) that the house which was used bears the address of No S16, Jalan 4K, Taman Ampang Jaya, Selangor;
- (b) that the named detainee with the common intention of the other detainees had caused the publication of a gaming website in 28 gaming machines kept as an open gaming house;

- A** (c) that the named detainee together with his accomplices had turned the house into a center to collate database and secure customers for the purpose of running online gaming at the international level;
- B** (d) that the role of the named detainee together with his accomplices is to handle input of database of the customers and promote online gaming using the portal 'WWW.PC28DD.COM';
- (e) that the named detainee together with his accomplices have assisted in running the online gaming for the duration of 12 hours per day from 12 noon to 12 midnight;
- C** (f) that the daily proceeds from the online gaming is estimated to be about RM12,500; and
- (g) that the named detainee and his accomplices each received a salary of between RM3,500 to RM5,000.
- D**

The First Schedule of the POCA reads as follows:

FIRST SCHEDULE

[Sections 2 and 22]

E REGISTRABLE CATEGORIES

PART I

1. All members of unlawful societies which —
 - F** (i) use Triad ritual; or
 - (ii) are constituted or used for purposes involving the commission of offences that are seizable under the law for the time being in force relating to criminal procedure; or
 - G** (iii) maintain secrecy as to their objects.
- G** 2. Persons who belong to or consort with any group, body, gang or association of two or more persons who associate for purposes which include the commission of offences under the Penal Code.
- H** 3. All traffickers in dangerous drugs, including persons who live wholly or in part on the proceeds of drug trafficking.
4. All traffickers in persons, including persons who live wholly or in part on the proceeds of trafficking in persons.
5. *All persons concerned in the organization and promotion of unlawful gaming.*
- I** 6. All smugglers of migrants, including persons who live wholly or in part on the proceeds of smuggling or migrants.
7. Persons who recruit, or agree to recruit, another person to be a member of an unlawful society or a gang or to participate in the commission of an offence.

8. Persons who engage in the commission or support of terrorist acts under the Penal Code.

A

[15] In this instance, when the application was made to the magistrate, I find that the written statement signed by Insp Sayed Mohd Faizal bin Sayed Baharom was produced and the reasons stated in the written statement relate to the grounds which led to the belief that the names of the applicants should be entered on the register within the meaning of s 12 of the POCA, namely being persons concerned in the organisation and promotion of unlawful gaming which is a registrable category under para 5 of the First Schedule of POCA. I thus find that the conditions under s 4(1)(a) of the POCA have been fully complied with when the magistrate issued the respective remand orders dated 19 October 2019 and that in this regard, the applicants have failed to show any procedural impropriety.

B

C

Right of counsel

D

[16] In respect of the issue raised by the learned counsel for the applicants that the applicants were not informed of their grounds of arrest, I find that this has been answered at para 6 of the affidavit affirmed by the first respondent. It is averred in the affidavit that the grounds of arrest have been interpreted and explained to the applicants in Mandarin by Sgt Wong Boon Wai and the applicants understood them. There is no affidavit filed by the applicants to traverse this averment and this court is entitled to take the trite position that the specific averment in that respect has remained unchallenged and should be deemed admitted by the applicants. In any event, I am of the considered view that this ground does not strike at the heart of the impugned remand order. In an application for the issuance of a writ of habeas corpus, the alleged procedural impropriety must distinctly relate to the detention order itself as distinguished from the detention per se (see *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors*).

E

F

G

[17] In respect of the arguments advanced by the learned counsel on the issue of right to counsel under s 4(3) of the POCA, it is instructive to refer to the observations made by the Federal Court in *Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors*. In that case, the apex court observed as follows:

H

Needless to say, the lawfulness of a detention would be dependent on the law in force from time to time. In dealing with the duty of the Court in cases of preventive detention Lee Hun Hoe CJ (Borneo) said in *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 at p 251:

I

Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so

- A** fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184.
- B**
- C** One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, art 5(1) of the Constitution guarantees that ‘no person shall be deprived of his ... liberty except in accordance with the law. *If this constitutional guarantee is to have any real meaning at all, then it is imperative that the courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.* (Emphasis added.)
- D**
- E** [18] The learned counsel contends that the applicants were denied of the right to counsel in breach of s 4(3) of the POCA. Section 4(3) of the POCA reads as follows:
- 4 Procedure before Magistrate
- F** (3) Except as provided in subsection 9(5), section 28A of the Criminal Procedure Code shall apply to any person remanded under section 4.
- and s 28A of the Criminal Code reads as follows:
- 28A Rights of person arrested
- G** (1) A person arrested without a warrant shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest.
- (2) A police officer shall, before commencing any form of questioning or recording of any statement from the person arrested, inform the person that he may —
- H** (a) communicate or attempt to communicate, with a relative or friend to inform of his whereabouts; and
- (b) communicate or attempt to communicate and consult with a legal practitioner of his choice.
- I** (3) Where the person arrested wishes to communicate or attempt to communicate with the persons referred to in paragraphs (2)(a) and (b), the police officer shall, as soon as may be, allow the arrested person to do so.
- (4) Where the person arrested has requested for a legal practitioner to be consulted, the police officer shall allow a reasonable time —

- (a) for the legal practitioner to be present to meet the person arrested at his place of detention; and **A**
 - (b) for the consultation to take place.
 - (5) The consultation under subsection (4) shall be within the sight of a police officer and in circumstances, in so far as practicable, where their communication will not be overheard. **B**
 - (6) The police officer shall defer any questioning or recording of any statement from the person arrested for a reasonable time until the communication or attempted communication under paragraph 2(b) or the consultation under subsection (4) has been made. **C**
 - (7) The police officer shall provide reasonable facilities for the communication and consultation under this section and all such facilities provided shall be free of charge.
 - (8) The requirements under subsections (2), (3), (4), (5), (6) and (7) shall not apply where the police officer reasonably believes that — **D**
 - (a) compliance with any of the requirements is likely to result in —
 - (i) an accomplice of the person arrested taking steps to avoid apprehension; or
 - (ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or **E**
 - (b) having regard to the safety of other persons the questioning or recording of any statement is so urgent that it should not be delayed.
 - (9) Subsection (8) shall only apply upon authorization by a police officer not below the rank of Deputy Superintendent of Police. **F**
 - (10) The police officer giving the authorization under subsection (9) shall record the grounds of belief of the police officer that the conditions specified under subsection (8) will arise and such record shall be made as soon as practicable.
 - (11) The investigating officer shall comply with the requirements under subsections (2), (3), (4), (5), (6) and (7) as soon as possible after the conditions specified under subsection (8) have ceased to apply where the person arrested is still under detention under this section or under section 117. **G**
- [19]** In construing the meaning of s 4(3) of the POCA read together with s 28A of the Criminal Procedure Code, it is clear to my mind that the purport of s 28A of the Criminal Procedure Code, specifically under sub-s (2), is aimed at affording arrested persons the right to counsel before commencing any form of questioning or recording of any statement. In the present application, there is no averment in any of the affidavits filed on behalf of the applicants that the applicants were denied of the right under that particular circumstance within the meaning of s 28A(2) of the Criminal Procedure Code. In fact, there was not even a single averment to the effect that the questioning of the applicants has commenced or that a statement from any of the applicants has been recorded. **H**
- I**

- A [20] The crux of the averments in the affidavits affirmed on behalf of the applicants in this respect pertains to the allegation that the applicants were denied of the right to counsel although the respondents knew that the applicants were represented by lawyers and that the respondents had failed to make available the information pertaining to the place where the applicants were detained or the fact that the applicants were detained under s 4(1) of the POCA. I find that these are not issues which are relevant to be considered in the present application. I am of the considered view that they do not relate distinctly to the rights prescribed under s 28A of the Criminal Procedure Code.

C *Earlier detention and prosecutorial powers of the public prosecutor*

- D [21] In respect of the applicants' argument that they were earlier arrested and remanded pursuant to investigations into an offence under the Immigration Act 1959/1963, I find that this arguments bear no merits in relation to the present application. The present application relate distinctly to the current remand order made by the magistrate under s 4(1)(a) of the POCA and the lawfulness or otherwise of the applicants' earlier arrest and detention is not a matter which is relevant to the present application (see *Mohd Faizal Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors*). Likewise, I also find that the applicants' argument in respect of the prosecutorial powers of the public prosecutor suffers from the same fate as it does not relate distinctly to the current remand order.

CONCLUSION

- F [22] On the premise of these reasons, I find that there is no procedural impropriety in the detention of the applicants pursuant to the respective remand orders dated 19 October 2019 issued by the magistrate. I hereby dismiss the application.

G *Application dismissed.*

Reported by Ashok Kumar

H

I